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In The

Supreme Court of the United States

October Term, 1998

PEGGY ANN BUCKLEY,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari
To The California Court of Appeal,
Second Appellate District, Division Two

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION, THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AND THE HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE CALIFORNIA BUILDING ASSOCIATION, THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AND THE HOME BUILDERS ASOCIATION OF NORTHERN CALIFORNIA AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

The National Association of Home Builders ("NAHB"), the California Building Industry Association ("CBIA), the Building Industry Legal Defense ("BILD") Foundation and the Home Builders Association of Northen California ("HBANC") have received the parties' written consent to file this brief as amici curiae in support of the petitioner and have filed the letters of consent with the Clerk of the Court.[1]

THE INTERESTS OF THE AMICI CURIAE ARISE FROM THEIR MEMBERS' CONCERNS AS TO THEIR ABILITY TO OBTAIN JUDICIAL REVIEW IN CALIFORNIA CONSISTENT WITH THE LAW LAID DOWN BY THIS COURT IN GENERAL AND, IN PARTICULAR, JUST COMPENSATION WHEN GOVERNMENTAL ACTION HAS DEPRIVED THEM OF ALL VIABLE USE OF THEIR LAND FOR SOME PERIOD OF TIME

The NAHB represents over 195,000 builder and associate members throughout the United States. Its members include people and firms that construct and

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1 No counsel for either party authored any part of this brief. No person or entity other than the NAHB, the CBIA, the BILD Foundation and the HBANC made any monetary contribution to the preparation or submission of this brief.

supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that calls into question the remedy available to its members when, as in the case at bar, governmental action has deprived them of all viable economic use of their land for some period of time.

The NAHB has been before the Court as an *amicus curiae* or as "of counsel" to the landowner in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)[2], *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, - U.S. -, 119 S.Ct. 1624 (1999).

The CBIA is a constituent member of the NAHB with over 5,500 home builders and related businesses who are responsible for over 70% of the homes built in California.

The BILD Foundation is a wholly owned subsidiary of the Building Industry Association of

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2 The Court's opinion cited the NAHB's brief. 483 U.S. at 840.

Southern California, a constituent member of both the NAHB and the CBIA, whose 1,800 members include a significant number of residential developers and associate businesses that take part in building 70% of all new residential units annually in the Southern California region.

The HBANC, which is also a constituent member of both the NAHB and the CBIA, has 1,100 members who construct approximately 80% of all new homes in the greater San Francisco Bay area.

The NAHB, the CBIA, the BILD Foundation and the HBANC submit their amici curiae brief in support of the petitioner in the present case to convince the Court to grant its writ of certiorari because, at bottom, the question is whether the courts of California are required to follow the law laid down by this Court or whether they are free to go their own way and hold that the commands of the Fifth and Fourteenth Amendments of the federal Constitution do not apply in California.

SUMMARY OF THE ARGUMENT

This Court has spoken on a number of issues concerning judicial review of land use actions in general and of regulatory takings in particular. The courts of California have seen fit to disregard many of this Court's pronouncements.

This Court has held that a claim that regulation has taken land is ripe when the governmental entity imposing the regulation has reached a final decision concerning the

application of the regulation; the courts of California hold that there is no final decision until a court has determined the validity of the regulation.

This Court has held that a per se taking has occurred when regulation deprives the owner of land all viable economic use of that land; the courts of California hold that the legitimacy of the reason for the regulation must be considered.

This Court has held that the ability to use land is a right; the courts of California hold that it is a privilege.

This Court has held that the ownership and use of land is a right protected by the substantive component of the Due Process Clause; the courts of California hold that there is no protected right where a discretionary approval is involved.

This Court has held that a taking of land occurs when governmental action does not substantially advance a legitimate state interest or when it deprives a landowner of viable economic use of his or her land; the courts of California cannot agree on what that means.

This Court has held that the Takings Clause and the Substantive Due Process portion of the Fourteenth Amendment provide alternative bases for reviewing a governmental action; the courts of California hold that all land use decisions must be reviewed under the Takings Clause.

California has walled itself off from the dictates of this Court and the rest of the nation when it comes to land use. Unless this Court grants its writ of certiorari and

reverses the California Court of Appeal's decision in *Buckley v. California Coastal Commission*, 68 Cal.App.4th 178, 80 Cal.Rptr.2d 562 (1998), landowners in California will continue to be deprived of rights recognized by this Court and enjoyed by landowners in every other state.

ARGUMENT

I. THE REGULATORY PROCESS DOES NOT INCLUDE JUDICIAL REVIEW – EXCEPT IN CALIFORNIA

A. The United States Supreme Court

> "As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the governmental entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to the property at issue.
>
> * * *
>
> "... While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities, respondent would not be required to resort to those procedures before bringing its § 1983 action because those procedures clearly are remedial." *Williamson County, supra*, 473 U.S. at 186 [citations omitted].

B. The Courts Of California

Buckley relied on the California Supreme Court's decision in *Landgate, Inc v. California Coastal Commission*, 17 Cal.4th 1006, 73 Cal.Rptr.2d 841, 953 P.2d 1188, *cert. denied.*, - U.S. -, 119 S.Ct. 179 (1998), which held that the time during which judicial review was ongoing was part of the "normal processing delay" associated with the land use approval process and therefore is not to be considered in determining if a taking has occurred. *Buckley, supra,* 68 Cal.App.4th at 183, 80 Cal.Rptr.2d at 566. The California Supreme Court did not even refer to *Williamson County* on the question of whether judicial review was part of the regulatory process in its opinion in *Landgate*. Instead, it sidestepped the issue entirely.

> "Nothing in *First English [Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)], however, is inconsistent with the recognition that a judicial determination of the validity of certain *preconditions to development* is a normal part of the development process, and the fact that a landowner must resort to such a determination does not constitute a per se temporary taking." *Landgate, supra,* 17 Cal.4th at 1030, 73 Cal.Rptr.2d at 841, 953 P.2d at 1203 [italics in the original].

II. THE PRESENCE OF A LEGITIMATE GOVERNMENTAL PURPOSE DOES NOT PROTECT A GOVERNMENTAL ENTITY FROM LIABILITY WHEN REGULATION DEPRIVES LAND OF ALL VIABLE ECONOMIC USE FOR SOME PERIOD OF TIME – EXCEPT IN CALIFORNIA

A. The United States Supreme Court

This Court has held that there are situations where governmental action can result in a taking without the application of any balancing test. After discussing the general need for "essentially ad hoc, factual inquiries" to determine when a taking has occurred, this Court stated:

> "We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. ...
>
> > "The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (landowner did not take issue with the validity of South Carolina's Beachfront Management Act).

This recognition that the achievement of legitimate governmental interests may require going beyond the use of the police power alone is, of course, no more than a restatement of the general rule that the measure of just compensation is not what the government has gained but

rather what the landowner has lost. *Boston Chamber of Commerce v. City of Boston,* 217 U.S. 189, 195 (1909).

B. The Courts Of California

The California Supreme Court completely rejected this Court's holding in *Lucas* and held that the courts of California are to consider the validity of interests to be served:

> "For better or for worse, in a four-to-three decision, the majority held a legally erroneous decision of a governmental agency during the development approval process that results in a delay of the permit is not a taking, as long as there is an objective, sufficient connection between the land use regulation in question and a legitimate governmental purpose. (*Landgate, Inc. v. California Coastal Commission,* 17 Cal.4th 1006, 1022.)
>
> * * *
>
> "Further, the Supreme Court said that the reality of the application process is that, on occasion, disputes will lead to judicial proceedings. However, so long as such proceedings are not brought on by the arbitrary or capricious acts of the governmental agency, the delay in approval occasioned by judicial proceedings is simply an unfortunate part of the normal process. (17 Cal.4th at pp. 1029-1032.)" *Buckley, supra*, 68 Cal.App.4th at 200, 80 Cal.Rptr.2d at 577 [footnote omitted].

III. THE DEVELOPMENT OF LAND IS A RIGHT, SUBJECT TO REASONABLE REGULATION, AND NOT A PRIVILEGE – EXCEPT IN CALIFORNIA

A. The United States Supreme Court

> "But the right to build on one's own property - even though its exercise can be subjected to legitimate permitting requirements - cannot remotely be described as a 'governmental benefit.'" *Nollan, supra*, 483 U.S. at 833, n.2.

B. The Courts Of California

> "The dedication of land or the payment of fees is a condition precedent to development is voluntary in nature. Even though the developer cannot legally develop without satisfying the condition precedent, he voluntarily decides whether to develop or not to develop. **Development is a privilege not a right**." *Trent Meredith, Inc. v. City of Oxnard*, 114 Cal.App.3d 317, 328, 170 Cal.Rptr. 685, 691 (1981)[emphasis added].

Of course, *Trent Meredith* was decided before this Court's decision in *Nollan*; unfortunately, that is irrelevant as far as the courts of California are concerned. See, *e.g.*, *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 893, 50 Cal.Rptr.2d 242, 268, 911 P.2d 429, 455, *cert. denied*, - U.S. -, 117 S.Ct. 299 (1996), and *Centex Real Estate Corp. v. City of Vallejo*, 19 Cal.App.4th 1358, 1363, 24 Cal.Rptr.2d 48, 51 (1993), both of which spoke of "the privilege of developing property."

IV. THE USE AND ENJOYMENT OF LAND IS A PROPERTY RIGHT PROTECTED BY THE CONSTITUTION – EXCEPT IN CALIFORNIA

A. The United States Supreme Court

This Court has held that land is property within the meaning of the Fifth and Fourteenth Amendments and that the owner of land is entitled to their protection.

> "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)[citation omitted].

Nor is this a new idea.

> "The right of the [landowner] to devote its land to any legitimate use is property within the protection of the Constitution." *State of Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928).

B. The Courts Of California

The courts of California disagree; they hold that there can be no property interest protected by the Due Process Clause where there is discretion.

> "Any significant discretion conferred upon the local agency defeats the claim of a property interest." *Clark v. City of Hermosa Beach*, 48 Cal.App.4th

> 1152, 1180, 56 Cal.Rptr.2d 223, 240 (1996), *cert. denied*, 520 U.S. 1176 (1997) (neither procedural nor substantive due process protection is available where a local agency wrongfully denied a discretionary land use approval)[citations omitted].

In as much as the Takings Clause only requires the payment of just compensation when private property is taken for a public use, Californians are forced to ask whether there could ever be a compensable taking, even if all of the other hurdles are overcome, given that virtually every development approval in California is discretionary. See, *e.g., Orinda Association v. Board of Supervisors*, 182 Cal.App.3d 1145, 227 Cal. Rptr. 688 (1986) (demolition permit), *Day v. City of Glendale*, 51 Cal.App.3d 817, 124 Cal.Rptr. 569 (1975)(grading permit) and *Friends of Westwood, Inc. v. City of Los Angeles*, 191 Cal.App.3d 259, 235 Cal.Rptr. 788 (1987) (building permit).

V. A TAKING OCCURS WHEN GOVERNMENTAL ACTION FAILS TO ADVANCE A LEGITIMATE STATE INTEREST – EXCEPT IN CALIFORNIA

A. The United States Supreme Court

In *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), this Court set the standard for determining when land use regulation took land:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state

> interests or denies an owner economically viable use of his land." [Citations omitted.]

The formulation in *Agins* does not stand alone; it has been repeatedly cited by the Court. See, *e.g., Dolan, supra*, 512 U.S. at 386, *Lucas, supra*, 505 U.S. at 1016, *Nollan, supra*, 483 U.S. at 834, *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987), *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985), and *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981).

Further, this Court has made it clear that a violation of the first prong of the *Agins* test, standing by itself, can result in a taking of the land affected even though the regulation leaves value in the land. *Dolan, supra*, 512 U.S. at 385 n.6 ("Petitioner assuredly is able to derive some economic use from her property.") [emphasis in the original].

B. The Courts Of California

> "There are several problems with [the landowner's] attempt to show that, as a matter of law, a taking of property occurred here. First, we cannot accept [the landowner's] theory that satisfaction of one element of the *Agins* test (i.e., that there was an invalid regulation) is enough to establish a taking as a matter of law. In *Nollan, Lucas*, and *Dolan*, the United States Supreme Court's analysis of the taking issue inextricably linked both the regulation's validity and the question of whether an economically beneficial use of the property remained in light of the regulation.

In light of later authority, *Agins* did not establish an 'either/or' type of test." *Del Oro Hills v. City of Oceanside*, 31 Cal.App.4th 1060, 1079, 37 Cal.Rptr.2d 677, 690 (1995).3

VI. JUST COMPENSATION MUST BE PAID WHEN A REGULATION TAKES LAND FOR THE TIME THAT THE REGULATION REMAINS IN EFFECT – EXCEPT IN CALIFORNIA

A. The United States Supreme Court

"We merely hold that where the government's actions have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

This Court recognized that the result would be to limit the flexibility of local governments and to impose costs on local government which, in California, they had not had to bear before.

"We realize that even our present holding will undoubtedly lessen to some extent the freedom and

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3 In fairness to the courts of California, it should be noted that another court of appeal, in *152 Valparaiso Associates v. City of Cotati*, 56 Cal.App.4th 378, 385-386, 65 Cal.Rptr.2d 551, 555-556 (1997), disagreed with the statement in *Del Oro Hills*.

> flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them." *First English, supra*, at 321.

B. The Courts Of California

The Buckley case before this Court is only the latest statement of the California courts that they do not intend to be bound by this Court's decision in *First English*. For example, in *Kavanau v. Santa Monica Rent Control Board*, 16 Cal.4th 761, 66 Cal.Rptr.2d 672, 941 P.2d 851 (1997), *cert. denied*, - U.S. -, 118 S.Ct. 856 (1998), the California Supreme Court dealt with a case where the court of appeal had earlier held that the landlord's constitutional right had been violated, a holding that the California Supreme Court felt itself bound by. *Kavanau, supra*, 16 Cal.4th at 777-779, 66 Cal.Rptr.2d at 682, 941 P.2d at 861. The California Supreme Court went on to hold that the landlord was not entitled to damages; the only remedy that he was entitled to was the opportunity to charge higher rents in the future even though he would have to charge higher than market rents to make up for what he had lost. *Kavanau, supra*, 16 Cal.4th at 785, 66 Cal.Rptr.2d at 687, 941 P.2d at 866.

Quite simply, the California Supreme Court's decisions are guided by a world view substantially

different from that expressed by this Court in *First English.*

> "The disparity in resources between the federal government and local governmental entities both explains and justifies the state procedure. The likelihood that the impact of a federal regulatory statute may effect a taking of property of such value as to threaten the federal treasury with insolvency is remote. Congress has determined that providing a damage remedy for those cases in which a taking occurs will not cause undue hardship. Few local governments could afford the financial impact of a decision that a widely applicable zoning or regulatory ordinance brought about a taking of all affected property." *Hensler v. City of Glendale,* 8 Cal.4th 1, 18-19, 32 Cal.Rptr.2d 244, 255, 876 P.2d 1043, 1054 (1994), *cert. denied,* 513 U.S. 1184 (1995)[footnote omitted].

This is, of course, a reprise of what the California Supreme Court said almost 20 years ago in *Agins v. City of Tiburon,* 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979), aff'd on other grounds, 447 U.S. 255 (1980). In *Agins,* the California Supreme Court, after quoting from a number of law review articles listing a parade of horribles which would result if a court were ever to hold that a land use regulation which went too far could result in inverse condemnation and the payment of just compensation, concluded:

> "In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which

adheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances." *Agins, supra*, 24 Cal.3d at 276-277, 157 Cal.Rptr. at 378, 598 P.2d at 31.

VII. THE TAKINGS CLAUSE AND THE SUBSTANTIVE DUE PROCESS CLAUSE PROVIDE ALTERNATIVE BASES OF LIABILITY – EXCEPT IN CALIFORNIA

A. The United States Supreme Court

"Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn." *Soldal v. Cook County*, 506 U.S. 56,70 (1992).

Thus, this Court has frequently evaluated the validity of governmental action under both the Takings and the Substantive Due Process Clauses. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993); *Connelly v. Pension Guarantee Corp.*, 475 U.S. 211 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); and *Pension Guarantee Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). See also *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), where four

justices evaluated legislation under the Takings Clause and five justices evaluated it under the Substantive Due Process Clause.

B. The Courts Of California

> "[T]he taking provision of the Fifth Amendment to the United States Constitution preempt [the landowner's] substantive due process claim." *Ventura County Flood Control District v. Campbell*, 71 Cal.App.4th 211, 223, 83 Cal.Rptr.2d 725, 732 (1999).

VIII. CONCLUSION

Mrs. Buckley has pointed out the views that a number of respected commentators hold on the role – more precisely, the absence of any role – that the courts of California play in overseeing the land use approval process. (Petition at 6-11.) Taken as a whole, they stand for the proposition that the courts of California have totally abdicated their role of supervising the actions of government in the land use approval process. Seldom do they find that governmental regulation of land use has gone too far and **never** do they reimburse the landowner for the injuries suffered. This is simply unsupportable at a time when California's housing needs are at an all time high and when NIMBYism ("Not In My Back Yard") is becoming more and more prevalent.[4]

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4 Ventura County had the slowest rate of growth of any of the seven counties in Southern California because of the growth control initiatives adopted in both the County and in all of its major cities over the last several years. Los Angeles Times, Part B at 16, Ventura

The treatment that Mrs. Buckley received at the hands of the California Court of Appeal, after remand from the California Supreme Court, is, unfortunately, not untypical and it is almost certain to continue unless, and until, this Court makes it clear that it meant what it had said in previous cases:

- The ownership of land means that the landowner has a property right, protected by the Fifth and Fourteenth Amendments to the federal Constitution, to use that land subject, of course, to reasonable regulation.

- When a landowner is deprived of all viable economic use of his or her land for some period of time, the federal Constitution mandates the payment of just compensation for that period.

- The question is not whether the local government meant to sterilize the land for some period of time but whether it actually did so; there is no good-hearted, empty-headed defense (local government's plea that it didn't mean to do it, that it was all a mistake).

County Edition (May 9, 1999). Four cities in the San Francisco Bay area have growth control initiatives on the ballot in November which will require voter approval for every project with more than 10 units in three of the cities and more than 20 in the fourth. San Francisco Chronicle, Part A at 13, Contra Costa Edition (May 31, 1999). The fact that these measures are being enacted by the people directly does not insulate them from judicial review (except, of course, in California). *City of Cleburne v. Cleburne living Center*, 473 U.S. 432, 448 (1985).

- Land use regulation must be analyzed for validity under both the Takings Clause and the Substantive Due Process Clause.

- In short, the Fifth and Fourteenth Amendments to the federal Constitution protect landowners even when their land is located in California.

The courts of California hold that there can be no invalid governmental action in the context of the land use approval process unless it shocks the judicial conscience. *Ventura County Flood Control District, supra,* 71 Cal.App.4th at 223, 83 Cal.Rptr.2d at 732. They have it wrong; it is the failure of those courts to follow the clear mandates of this Court which should shock the judicial conscience.

Article VI, § 2, of the federal Constitution has meant what is says – the federal Constitution is the supreme law of the land and judges in every state are bound by it – for over 180 years. *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816). Nevertheless, it is sometimes necessary for this Court to remind the judges of the lower courts of their obligation to follow the law as laid down by this Court. *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958).

The NAHB, the CBIA, the BILD Foundation and the HBANC respectfully request that this Court grant Mrs. Buckley's petition for writ of certiorari.

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